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No. 784

# In the Supreme Court of the United States

OCTOBER TERM, 1964

FRANKLIN L. BATTEN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 2a) is not reported. The opinion of the district court denying a motion for judgment of acquittal is reported at 226 F. Supp. 492.

### JURISDICTION

The judgment of the court of appeals was entered October 15, 1964. A petition for rehearing was denied on November 27, 1964. The petition for a writ of certiorari was filed on December 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



761-730—65

## QUESTIONS PRESENTED

1. Whether a formal investigation instituted by written order of the Securities and Exchange Commission pursuant to statute is a "proceeding" within the meaning of 18 U.S.C. 1505.

2. Whether testimony of the perjurer and corroborating evidence as to the fact of perjury satisfy the special rule as to the quantum of evidence in perjury cases.

## STATEMENT

Petitioner was convicted after trial by jury in the United States District Court for the District of Columbia on a two-count indictment charging subornation of perjury and obstruction of justice, in violation of 18 U.S.C. 1622 and 1505, in a proceeding before the Securities and Exchange Commission (J.A. 89). He was sentenced to imprisonment for not less than four months nor more than one year and one day on each count, the sentences to run concurrently (J.A. 143-144). The court of appeals affirmed per curiam.

The evidence may be summarized as follows:

Petitioner was president of Batten and Company, Inc., and owned 99 percent of its stock (J.A. 4). This company was registered with the Securities and Exchange Commission (J.A. 135) and, from February to May 1960, was the underwriter of an offering of securities of Saber Boat, Inc., being sold pursuant to regulations of the Securities and Exchange Commission (J.A. 5, 90).

On May 4, 1960, petitioner directed his bookkeeper to enter in the cash receipts journal of Batten and Company a false entry indicating that $2,000 had

been received from his brother-in-law, Ralph J. Sines (J.A. 53–54, 58, 122). On Sunday, May 8, 1960, petitioner called a cashier of Batten and Company to the office and had him write a $2,000 check payable to Sines (J.A. 51). On May 9, 1960, petitioner gave the check to the bookkeeper who entered it on the cash disbursements journal as a payment to Sines (J.A. 54–55, 118). At that time the check appeared to have been endorsed by Sines and Batten and Company (J.A. 59, 116). However, neither Sines nor his wife had endorsed it (J.A. 31, 44). Petitioner instructed the bookkeeper to deposit the check in the account of Batten and Company (J.A. 55–56). The $2,000 was thereby withdrawn and redeposited in the Batten and Company account at the same time by the same instrument (J.A. 57–61). There was no actual payment from or to Sines (J.A. 58), and Sines had no knowledge of these events (J.A. 31).

On October 6, 1960, the Securities and Exchange Commission issued an order initiating a formal investigative proceedings for the purpose, *inter alia*, of determining whether petitioner and Batten and Company "made false, fictitious and misleading entries in the books and records of Batten & Co." (J.A. 6, 131–132). A Securities and Exchange Commission attorney, C. D. Ward, was placed in charge of the investigation and empowered to administer oaths and affirmations and to subpoena witnesses (J.A. 4, 6, 133).

Mr. Ward examined the books and records of Batten and Company (J.A. 5) and noted therein Sines' name as a purchaser of a thousand shares of Saber

Boat stock (J.A. 7). About the beginning of October 1960, petitioner called Sines and told him that a Mr. Ward from the Securities and Exchange Commission would be calling him (J.A. 21–22) and that Sines should tell Ward he had bought and sold Saber Boat stock (J.A. 22) even though this was not true (J.A. 19, 28, 30, 42–43). Later the same day Ward called Sines (J.A. 6, 20, 22, 33). Thereafter, petitioner came to Sines' home where Sines reported that he had told Ward he had bought and sold the stock. Sines also said that he was going to be subpoenaed and would have to testify under oath, and that confirmations of the Saber Boat transactions would be required (J.A. 20–21, 23, 25).

Sines received a subpoena on October 7, 1960, and he informed petitioner (J.A. 23–25). Sines was told to "just keep telling them you bought it and sold it" (J.A. 25). Confirmations of the purchase and sale of Saber Boat stock in the name of Mr. and Mrs. Sines were forwarded to Sines by Batten & Company (J.A. 26, 101). On the day Sines was to testify, October 10, 1960, petitioner again met with Sines and repeatedly urged him to "just tell them you bought it and sold it" (J.A. 26–27, 39, 48). Petitioner retained an attorney who advised Sines to "tell the truth" and accompanied him to the hearings (J.A. 45–46). At the hearings Sines was placed under oath (J.A. 7, 28, 95) and testified that he had bought and sold the Saber Boat stock (J.A. 8–9). The following day, after a night of worry (J.A. 29), Sines called Ward and arranged to testify again (J.A. 29). This time he was

placed under oath and testified that he did not have any transactions in Saber Boat stock (J.A. 30).

## ARGUMENT

1. Petitioner urges that the statutory formal investigative proceeding conducted by the Securities and Exchange Commission was not a "proceeding" within the meaning of 18 U.S.C. 1505, which makes it unlawful to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States (Pet. 5–8). This contention is without merit. The authorizing statute (15 U.S.C. 78u (a) and (b)) specifically empowers the Commission to "make such investigations as it deems necessary" to determine violations of its regulations and confers subpoena power and the power to administer oaths for "the purpose of any such investigation, or any other proceeding under this chapter." Congress enacted 18 U.S.C. 1505 to extend "the protection now provided by law for witnesses in Court proceedings, to witnesses in proceedings before either House of Congress or committees of either House (or joint committees), and to witnesses in proceedings before administrative agencies of the Government." H. Rep. No. 1143, 76th Cong., 1st Sess. (1939); S. Rep. No. 1135, 76th Cong., 1st Sess. (1939). There is no reason to believe that Congress had any intention of adopting a narrow definition of "proceedings" or of drawing a distinction between "agency proceedings" and "congressional investigations". Its purpose was to provide for the "protection of witnesses appearing before any department, independent

establishment, or other agency of the United States, or the Congress of the United States * * *. The need of outlawing intimidation and corruption applies to every witness." *Ibid.* While the decided cases have distinguished, for various purposes, between adjudications and investigations by the Securities and Exchange Commission, they have consistently referred to both as "proceedings." See *Hannah* v. *Larche,* 363 U.S. 420, 446; *Edwards* v. *United States,* 312 U.S. 473, 481; *Securities and Exchange Commission* v. *Bourbon Sales Corp.,* 47 F. Supp. 70, 71 (W.D. Ky.).

2. Petitioner's argument that the evidence was insufficient to meet the special quantum of proof for perjury cases (which also applies to subornation of perjury under *Hammer* v. *United States,* 271 U.S. 620) is based on the contention that the testimony of the perjurer cannot be used as evidence of the falsity of his earlier testimony. This proposition has been consistently rejected by courts of appeals, *e.g., Segal* v. *United States,* 246 F. 2d 814, 821 (C.A. 8), certiorari denied, 355 U.S. 894; *United States* v. *Henderson,* 185 F. 2d 189, 191 (C.A. 7). In this case there was considerable evidence apart from the testimony of Sines to corroborate the falsity of his prior sworn statement. The bookkeeper and cashier of Batten and Company testified to facts supporting the charge that petitioner engaged in a false scheme to make the company records show that Sines had bought and sold Saber Boat stock. Mrs. Sines, who appeared on the confirmations as joint owner of the Saber Boat shares, testified that neither she nor her husband had bought

or sold stock (J.A. 42–44). Admissions of petitioner placed in evidence through Mrs. Sines and Moore indicated that he was aware of the false nature of the testimony (J.A. 43, 49). On this evidence, the rule that falsity must be proved by two witnesses or by one witness and corroborating circumstances was amply satisfied.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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